



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 482 OF 2008

ANNE NAANYU KILELE.....PLAINTIFF

VERSUS

STINGRAY LIMITED1ST DEFENDANT

KIRIT JUMAR NATUBHAI PATEL 2ND DEFENDANT

KIRAN PATEL..... 3RD DEFENDANT

ANJANA KIRIT KUMAR PATEL.....4TH DEFENDANT

THE STATUTORY MANAGER CHARTER HOUSE BANK 5TH DEFENDANT

JUDGMENT

1. Two people who would have possibly been the main rivals over the ownership of land known as LR MN/111/159(**the suit land**) have left their widows to do battle. Walter Kiprono Kilele (Kilele) died on 17th September 1998 and left Anne Naanyu Kilele (The Plaintiff or Anne) a widow. While Anjana Kirit Kumar Patel (The 4th Defendant or Kumar) is the widow of Kirit Kumar Natubhai Patel (Kirit).

2. There is common cause in respect to many aspects of the controversy herein. On or about 23rd November 1990, the Government of Kenya allotted Kilele unsurveyed land in Kijipwa, Kilifi District (P Exhibit 2). The land described then as 122540/15(B) was designated for hotel use only. It is the current suit land. Kilele paid the requisite stand premiums, stamp duty, land rent, conveyancing and registration fees, and was issued with grant C.R 21707 to the suit land registered on 6th August 1991(P Exhibit 4).

3. The suit land was subsequently, on 22nd December 1992, transferred to Stingray Limited (The 1st Defendant or Stingray). Anne on the one hand and Stingray and Kirit on the other are not agreed on the circumstances under which the transfer happened.

4. It is the case for Anne that sometime in 1992, Kirit and one Kiran Patel (The 3rd Defendant) approached Kilele with the following proposal:-

a. That the Kirit and Kiran together with Kilele jointly invest in a hotel business undertaking.

b. That the suit property be transferred to Stingray being the vehicle that Kirit, Kiran and Kilele would use for the venture.

c. That the suit property would be deemed as Kilele's contribution in the hotel venture whereas the Kirit and Kiran would make monetary contribution equal to the value of the suit property.

5. Anne avers that the three agreed to the proposed arrangement and so as to effect the agreement, Kilele transferred the suit property to Stingray. In addition, Kilele was appointed a director thereof. However, it is contended, the intended venture fell through as Kirit and Kiran failed and/or refused to honour their part of the agreement. It is not disputed that the land remains undeveloped to date.

6. Then there were changes to the shareholder and directorship of Stingray. By a Notification of Change of Directors and Secretaries dated

1st September 1992, Kilele ceased being a director (P Exhibit 5). Further by a share transfer form dated 1st September 1998, Kilele is said to have transferred his one (1) share, his only share, to Anjana (P Exhibit 6). Anne contends that the changes and transfer are fraudulent and illegal and sets out the particulars of the alleged conduct as follows:-

22. The Plaintiff avers that on the 17th day of September 1998 the Late Dr. Walter Kiprono Kilele died in a car crash.

PARTICULARS OF FRAUD AND ILLEGALITY ON THE PART OF THE 1ST, 2ND, 3RD AND 4TH DEFENDANTS.

- a. Fraudulently transferring the deceased share to the 4th Defendant when he was already deceased.
- b. Fraudulently and illegally removing the deceased name from the company directorship.
- c. Allegedly paying stamp duty for the share transfer over one (1) share after the demise of the deceased.
- d. Transferring the deceased share valued at Kshs.100.00 only at an under value.
- e. Fraudulently executing the share transfer form.

7. It is common ground that the suit land is currently charged to CharterHouse Bank in liquidation (CharterHouse) to secure a loan of Kshs.20,000,000.00 advanced by the Bank to Auto Import Limited (Auto) (P Exhibits 11 & 12). Auto is a family company in which Anjana and the late Kirit are shareholders and directors. Anne avers that the loan was borrowed and the suit property encumbered without any intention of the facility being repaid.

8. She outlines how the supposed fraudulent scheme was carried out:-

25. Further the Plaintiff avers that the charge was wrongfully and maliciously and illegally registered by the 5th Defendant against the property and on account thereof the Estate of the late Dr. Walter Kiprono Kilele has suffered loss.

PARTICULARS AGAINST THE 1ST, 2ND, 3RD AND 4TH DEFENDANTS:

- a. Offering the suit property as a security against a loan which was not beneficial to the 1st Defendant.
- b. Failing to ensure that the loan was serviced by the borrower.
- c. Offering the said property for sale in order to liquidate other unrelated loans.
- d. The 4th Defendant purportedly held herself out as a director of the 1st Defendant when she knew that she was not such Director.
- e. The 3rd defendant perpetuated the frauds by allowing the property to be charged.

PARTICULARS OF FRAUD AND ILLEGALITY ON THE PART OF THE 5TH DEFENDANT

- a. Failing to carry out a due diligence test on the company.
- b. Advancing and permitting a loan which was not being serviced to remain unserviced.
- c. Registering a charge which was not properly executed.
- d. Maintaining a charge against the property when it knew or ought to have known that the same is tainted with fraud.
- e. Failing to discharge the charge despite the knowledge that the same is illegally being maintained against the title.

9. The Bank is also assailed as fraudulent for failing to carry out due diligence on the company, registering a charge which was not properly executed and maintaining a charge against the property when it knew or ought to have known that the same is tainted with fraud.

10. The suit land is valuable. A valuation dated 17th October 2007 (P. Exhibit 16) returned a value of Kshs.120,000,000.00. In a Plaintiff dated 26th August 2008 and filed on even date Anne seeks judgment against the Defendants jointly and severally as follows:-

- a. A permanent injunction prohibiting the 5th Defendant from dealing with the land subject matter of the suit.
- b. Unconditional discharge of charge registered in favour of the 5th Defendant.

- c. A cancellation of the name of the 1st Defendant and a replacement with the name of the Plaintiff.
- d. A declaration that the property described as C.R No. 21707 (L.R No. MN/III/1591) belongs to Dr. Walker Kiprono Kilele.
- e. Damages for breach of contract.
- f. A permanent injunction prohibiting the 5th Defendant from dealing with the land subject matter of the suit.
- g. Mesne profit.
- h. Cost of the suit.
- i. Interest on (e) (g) and (h) above.

11. Save for Charterhouse, the other Defendants filed a joint statement of Defence. But let me start with that of Charterhouse.

12. Charterhouse avers that Anne is non-suited and that no cause of action accrues in her favour against it. The Bank contends that the suit is contra statute and contrary to public policy. It denies all allegations of wrongdoing.

13. The other Defendants presented a joint statement of Defence dated 16th October 2008 and filed on the same date. The Defendants challenge the capacity of the Plaintiff to sue. It is contended that Kilele did not appoint Anne as the executor of his will and she therefore has no locus to institute the suit.

14. Regarding the matters leading to the transfer of the property, Stingray, Kirit and Kiran state Kilele sold the property to Stingray and subsequently transferred it vide a transfer dated 22nd December 1992. In respect to the directorship of the company, the three contended that Kilele was appointed a director on an ex gratia basis and in consideration of a longstanding friendship between himself, Kirit and Kiran and not on the basis of an oral agreement.

15. In any event, it is argued that the alleged agreement to the extent that it is not in writing, is invalid and unenforceable for contravening the provisions of Section 3 of the Law of Contract Act (Cap 23 Laws of Kenya). Further that the claim is time barred by dint of the provisions of Section 4 of the Limitation of Actions Act.

16. As to the transfer of a share to Anjana, it is alleged that it was for a consideration of Kshs.2,000,000.00 and through a share transfer dated 1st September 1998. That whilst the transfer was registered on 4th December 1998 (a date after the death of Kilele), the date of registration is immaterial as Kilele had ceased to be a director as from 1st September 1998. The date of the share transfer.

17. As to the charge of the property to Charterhouse, the three deny that it was fraudulent.

18. Kiran puts up his Defence alone. He states that he ceased to be a shareholder and director of Stingray in March 1998 and is wrongly enjoined to the proceedings as he is neither a party nor did he participate in charging the suit property to Charterhouse.

19. Kirit died on 7th October 2012 during the subsistence of these proceedings. His estate did not join the suit and the suit against him abated. A fact expressly admitted by Counsel for Anne on 5th March 2009 when the hearing commenced.

20. Three witnesses testified in this matter, Anne, Anjana and one Petterson Wachira. The latter who is a senior clerical officer at the Registrar of Companies testified on behalf of the Plaintiff. The evidence of the witnesses shall be discussed in so far as they are relevant in resolving the issues that have arisen for determination.

21. There was no joint agreement of issues and this Court has had to formulate them after giving regard to the pleadings and the proposals put forward by the parties in their written submissions. They are:-

- i. Does Anne have locus standi to bring this suit?
- ii. Is the suit by Anne time barred?
- iii. In what circumstances was the suit property transferred to Stingray?
- iv. Are the Defendants guilty of the allegations of fraud put forward by Anne?
- v. Is Anne entitled to the prayers in the Plaintiff?
- vi. What is the suitable order on costs?

22. Anne states that she is vested with powers to collect and dispose of the residual estate of Kilele pursuant to orders made in High Court Succession Cause No. 2699 of 1999 (in the matter of The Estate of Dr. Walter Kiprono Kilele). The Certificate of Confirmation of Grant (P.

Exhibit 1) shows that the grant was issued to Major General Lazarus Sumbeiywo. Yet it also shows that the suit property was not one of the properties specifically identified and distributed thereunder. However, under the schedule of distribution there appears the following in regard to the residue of the estate:-

“Residue

Anne Naanyu Kilele be and is given the authority to establish, gather and collect the residue (if any) and pay off all the outstanding debt and liabilities of the Deceased and the balance (if any) shall be vested in her absolutely”.

23. Anne invokes this power to mount and maintain these proceedings in her personal name. The 1st, 3rd and 4th Defendants challenge her legal authority on the basis of Section 79 of the Law of Succession Act which reads:-

“S. 79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative”.

24. My understanding of these provisions is that the executor and administrator shall be the personal representative of the deceased for all purposes of the grant and in the absence of any limitation imposed by the grant, all property of the estate shall vest in him as a personal representative. In that matter, Major General Lazarus Sumbeiywo is undoubtedly the personal representative to Kilele. However, in respect to the vesting of property, there is a limitation imposed in the grant. The residue of the property is vested in Anne absolutely. As the case for Anne is posited on the proposition that the suit property is part of the residue of the Estate, this Court holds that Anne has locus to mount the prosecution of these proceedings in her own name. The objection on *locus standi* fails.

25. The starting point in considering the plea of time barred raised by the 1st, 3rd and 4th Defendants is to understand the nature of the cause of action brought by Anne. As I understand it, the gravamen of the grievance by Anne is that the 2nd and 3rd Defendants breached an oral agreement entered between them and Kilele that the suit property would be transferred to Stingray in consideration that the 2nd and 3rd Defendants would make monetary contribution equal to the value of the suit property to invest in a hotel venture. That the suit property would be deemed as Kilele’s contribution to the property.

26. That is a claim for breach of contract. Section 4(1) of the Limitation of Actions Act provides as follows in respect to suits brought on contract;

S. 4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

27. While Anne does not lead evidence as to when the hotel was to be put up, breach of contract can be inferred on the date the alleged fraudulent transfer of the shares of Kilele was said to be effected, on 4th December 1998. If breach happened on that day then the time for bringing a cause of action on contract expired on or about 3rd December 2004. This suit, brought on 26th August 2008, would therefore be time barred.

28. As to why she came to Court late, Anne testified;

“We had a Succession Court Case that took 9 years. Concluded on 12th June 2007 hence our delay in coming to Court”.

Even if this is accepted as true, there is no evidence that she sought extension of time. The Plaintiff’s claim on contract is time barred.

29. Yet I may be in error in this conclusion, I therefore turn to consider the merit of the claim on contract. It is common cause that Kilele transferred the suit property to Stingray. The grievance by Anne is that the 2nd and 3rd Defendants breached an oral agreement that the Defendants would put up a hotel venture on the suit land, it being the consideration for the transfer of the suit land to Stingray in which Kilele was a shareholder.

30. But this claim which is hinged on an oral agreement immediately runs into a headwind. In its Defence, the 1st to 4th Defendants set up the provisions of Section 3 of the Laws of Contract Act (Chapter) as then existing. It reads:-

S. 3. Certain contracts to be in writing

(1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

(2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the

intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-;

- i. has in part performance of the contract taken possession of the property or any part thereof; or
- ii. being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

31. The claim upon the oral contract is in respect to disposition of interest in the suit property. The suit property is land. As it is not in writing then the claim is without foundation.

32. I turn to another aspect of the claim. There is an allegation that there was unlawful transfer of the share belonging to Kilele to Anjanja. Yet looking at the prayers in the Plaintiff, I must wonder whether the Court need consider this aspect of the case at all. This is because Anne does not seek reversal of the transfer of the share from Anjana to the Estate of Kilele or to herself as the beneficiary of the residual estate. The Court reproduces the prayers for clarity:-

- j. A permanent injunction prohibiting the 5th Defendant from dealing with the land subject matter of the suit.
- k. Unconditional discharge of charge registered in favour of the 5th Defendant.
- l. A cancellation of the name of the 1st Defendant and a replacement with the name of the Plaintiff.
- m. A declaration that the property described as C.R No. 21707 (L.R No. MN/III/1591) belongs to Dr. Walker Kiprono Kilele.
- n. Damages for breach of contract.
- o. A permanent injunction prohibiting the 5th Defendant from dealing with the land subject matter of the suit.
- p. Mesne profit.
- q. Cost of the suit.
- r. Interest on (e) (g) and (h) above.

33. Anne is preoccupied in seeking a reversal of the suit property in an unencumbered state back to Kilele(perhaps to estate of Kilele) and entry of her name as the owner. This is only possible if she is successful on the claim for breach of contract in respect to the transfer of the suit land. Yet, this, she has failed to establish. In the circumstances, even if I was to hold in her favour that the share transfer to Anjana was unlawful, the appropriate order would be to reverse the share of Anjana back to the Estate of Kilele or to herself as a beneficiary. A prayer she has not sought.

34. However, because my appreciation of the circumstances may be wrong, I proceed to consider the merit of her claim in respect to the share.

35. Five issues are raised in respect to the transfer of shares (See Paragraph 22 of the Plaintiff). I consider each one of them in turn but I start with the allegation that the Defendant's are guilty of fraudulently executing the share transfer form. She who asserts must prove. What was the nature of the fraud? In her evidence Anne states that no consideration was made for the transfer. On her part Anjana told Court that her husband Kirit (the deceased) dealt directly with Kilele but that she paid Kshs.2,000,000.00 for the share.However, she did not have any evidence of payment. In submissions made on her behalf Anne alleges that in the absence of payment for the value of the share, this Court should infer a fraud.

36. On the other hand, Kirit produced a Document Examiner's Report (D. Exhibit Pages 18-20) in which S. M Mweu,a document examiner,

returned an opinion that the signature on the form of transfer dated 1st September 1989 alleged to be of Kilele was in fact written by the same hand as that which wrote known signatures of Kilele. A verdict that the signature on the transfer form was as a matter of fact that of Kilele.

37. Counsel for Anne attempted to downgrade that evidence by arguing that the document examiner was not called to produce his report and his testimony was therefore untested. This Court was urged to disregard it. I am afraid I cannot do so. The document examiner's report was produced as an exhibit without any objection by Counsel for Anne. Counsel did not require the maker of the report to testify on it and forsook the right to test it on cross-examination. It is therefore accepted as made and this Court has no reason to doubt its contents. The Court believes it.

38. For that reason, and since Anne does not sue for the consideration of Ksh.2,000,00.00 or for return of the share, I find that Kilele indeed transferred one (1) share to Anjana. In light of what Anne pleads, lack of proof payment of the consideration does not count for much.

39. It is true that although the transfer form was dated 1st September 1998, the transfer of the share was effected a date after the death of the deceased. This may well be irregular because the transferee should have involved the Estate of the transferor since the transferor was dead. However, as this Court has found that the transfer was authentic, equity will treat as done that which ought to have been done. The Estate of the deceased cannot, on account of the late payment for the transfer, alone, seek to reverse what the deceased had willingly done in his life time.

40. For similar reason the criticism that the stamp duty was paid late or that the transfer was at under value cannot be used to defeat the interest of Anjana in the share.

41. Let me turn to the last issue that the deceased was fraudulently and illegally removed as a director of the company. In that respect certain anomalies emerged from the records of the company at the Companies Registry. It was the evidence of Petterson Wachira (PW2) that although Form 203A (Notification of change of Directors and Secretaries or in their particulars) (P. Exhibit page 59) showed that Kiran had resigned as Director in 1992, the annual return of the company for the year under 31st December 1998 still shows Kiran as a director. Again, although Kilele's resignation from directorship is through a letter of 2nd March 1998, the notification of his resignation is dated 1st September 1998.

42. All that said, the question remains whether or not Kilele was fraudulently and illegally removed as a Director? This Court is unable to answer this in favour of Anne because she did not prove that Kilele's letter of resignation dated 2nd March 1998 was a forgery or otherwise unlawful. In any event, and this is also important, the suit herein is not about the reinstatement of the estate of Kilele or his beneficiary to the directorship of Stingray.

43. From whatever angle, the suit by the Plaintiff is without merit and is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 20th Day of December 2019.

F. TUIYOTT

JUDGE

PRESENT:

Mugo holding brief Wambugu for Plaintiff

Chege holding brief Ondieki for 1st to 4th Defendants

Court Assistant: Nixon